No. 1045

In the Supreme Court of the United States

October Term, 1945

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CITATIONS

654477—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 106

CLARENCE ARTHUR LANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 47–49) is reported at 148 F. 2d 816.

JURISDICTION

The judgment of the circuit court of appeals was entered April 24, 1945 (R. 49), and a petition for rehearing (R. 50–52) was denied May 17, 1945 (R. 53). The petition for a writ of certiorari was filed June 4, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Ap-

peals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial court erred in admitting certain evidence obtained through an alleged illegal search and seizure, although petitioner did not move before trial to suppress such evidence and did not object to its admission at the trial.

STATEMENT

Petitioner and Walter D. Lane were indicted in the United States District Court for the Southern District of Florida in four counts. Count 1 charged them with carrying on the business of a distiller without having given bond as required by law (26 U. S. C. 2833); count 2, with possessing nontax-paid liquor (26 U. S. C. 2803); count 3, with carrying on the business of a distiller and distilling certain liquor with intent to defraud the United States of the tax on such liquor (26 U. S. C. 2833); and count 4, with working at a distillery upon which no sign bearing the words "Registered Distillery" was placed as required by law (26 U. S. C. 2831). (R. 1–4.) After a jury trial, petitioner was convicted on all counts (R. 41–42), and he was sentenced to two years' imprisonment on each of counts 1 and 3, two years and a day on count 2, and six months on count 4, the sentences on counts 1, 3, and 4 to run concurrently with the sentence on count 2; and, in ad-

dition, he was fined $100 on each of counts 1 and 3 (R. 7–8).[1] On appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 47–49).[2]

ARGUMENT

Petitioner's sole contention (Pet. 5–6, 6–8; Br. 2–13) is that the trial court committed reversible error in admitting certain evidence which he alleges the Government obtained through an illegal search of his home, although admittedly he did not move before the trial to suppress such evidence and he did not object when it was offered at the trial. Petitioner argues that before evidence which has been obtained through a search and seizure may be admitted, it is incumbent upon the Government to show that the search and seizure were lawful, even though the defendant against whom such evidence is offered does not object to the admission thereof. The contention and argument are plainly without merit.

[1] At the close of the Government's case, Walter D. Lane withdrew his plea of not guilty and entered a plea of guilty (R. 28). He was sentenced to imprisonment for a year and a day on count 2; imposition of sentence on the other counts was suspended and he was placed on probation for five years to begin upon his release from imprisonment (R. 5–6).

[2] Petitioner does not challenge the sufficiency of the evidence to support his conviction (see Pet. 4), and, therefore, we deem it unnecessary to delineate the proof adduced at the trial. The evidence is summarized in the opinion of the circuit court of appeals (R. 48), and the facts relevant to the question presented by the petition are set forth at p. 5, *infra*.

It is settled that, unless there has been no opportunity to raise an objection in advance of trial, the court in the trial of a criminal case is not concerned with whether relevant evidence has been obtained through an illegal search and seizure. *Nardone* v. *United States,* 308 U. S. 338, 341–342; *Segurola* v. *United States,* 275 U. S. 106, 111–112; *Cromer* v. *United States,* 142 F. 2d 697, 699 (App. D. C.), certiorari denied, 322 U. S. 760; *United States* v. *Wernecke,* 138 F. 2d 561, 564 (C. C. A. 7), certiorari denied, 321 U. S. 771; *Smith* v. *United States,* 112 F. 2d 217 (App. D. C.), certiorari denied, 311 U. S. 663; *Nunes* v. *United States,* 23 F. 2d 905 (C. C. A. 1). *A fortiori,* the objection that a search and seizure violated the defendant's constitutional rights cannot be asserted for the first time on appeal. *Cromer* v. *United States, supra; Gregg* v. *United States,* 113 F. 2d 687, 691 (C. C. A. 8); *Lund* v. *United States,* 19 F. 2d 46, 68 (C. C. A. 8); *Linder* v. *United States,* 290 Fed. 173, 174 (C. C. A. 9), reversed on other grounds, 268 U. S. 5; *Singleton* v. *United States,* 290 Fed. 130, 131 (C. C. A. 4); *Lusco* v. *United States,* 287 Fed. 69, 70 (C. C. A. 2). In the instant case, the seizure of the articles introduced at petitioner's trial occurred on September 24, 1943 (R. 20). The trial took place on June 28, 1944 (R. 11–12). It is thus clear that petitioner had ample opportunity to question the legality of the search and seizure in advance of

the trial. Not having done so, and, in addition, not having objected to the admission of the articles at his trial below, he is now in no position to assert that the search and seizure were invalid and that the trial court should *sua sponte* have conducted an injury into the validity of the search and excluded the challenged evidence.

On the merits, petitioner's contention that the evidence was procured through an illegal search and seizure is equally untenable. The evidence in question consisted of a portion of a still, cartons containing glass jugs, several empty jugs, a jar containing syrup, and labels (R. 23). Investigators of the Alcohol Tax Unit testified that they saw these articles in the open near petitioner's house and in the garage when they went there on September 23, 1943, with a warrant for the purpose of arresting petitioner. No one was at home at the time, and the agents saw the articles while they looked about the house seeking petitioner. The next day they obtained a search warrant, searched petitioner's premises, and seized the articles. (R. 14–15, 17, 20.) In arguing that the search was illegal (Pet. 7; Br. 5), petitioner appears to proceed on the basis that the search originated from knowledge obtained by the agents through an "exploratory" search conducted the previous day. However, as pointed out by the court below (R. 49), the agents had the right to look for petitioner on that occasion,

and "What they saw was open to view, and can hardly be called a search."

CONCLUSION

The case was correctly decided below, in accordance with well-settled principles. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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